Petition

Office - Supreme Court, U.S.
FILED
OCT 10 1981

81-862

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

JUSTINE H. ROBERSON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Fifth Circuit Court of Appeals negated the element of inadvertence to trigger a warrantless search under the plain view doctrine?

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GROUNDS FOR JURISDICTION

Petitioner was tried before a jury in the United States Court for the Western District of Texas at Waco, Texas, and was found guilty of theft of mail matter by postal employee and sentenced to imprisonment for a period of one year on September 5, 1980. On appeal to the United States Court of Appeals for the Fifth Circuit, the decision of the lower court was affirmed on July 7, 1981. The Petition for Rehearing was denied on August 24, 1981.

This Court has jurisdiction to review this case pursuant to Rule 17.1(a) of the Rules of the Supreme Court.

FOURTH AMENDMENT
to the
CONSTITUTION OF THE UNITED STATES OF AMERICA

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Justine H. Roberson, Petitioner, was employed in the capacity of a postal carrier at the Copperas Cove Post Office in Copperas Cove, Coryell County, Texas, in May, 1980. Following customer complaints of lost mail, Postal Inspectors prepared three "test letters" with bogus names and addresses. These letters were included with the regular mail scheduled to be delivered by Roberson on the following day.

On May 14, 1980, and while Roberson was on her mail route, the Postal Inspectors maintained a "loose surveillance" of Roberson throughout the day. The Inspectors observed that Roberson had not delivered some free product samples to all addresses. When Roberson returned to the Post Office parking lot, she was seen placing a box in her personal vehicle. The Inspectors, while looking through the windows of the vehicle, concluded that the box contained the free product samples. Two hours later, Roberson got off work and went to her private vehicle. She got in, sat in the driver's seat, and began opening mail which she had in her purse. The Postal Inspectors approached the driver's side of her vehicle, peered in, and determined that one of the test letters was in Roberson's hand. She was asked to step out of her vehicle by the Postal Inspectors. They then searched her purse and vehicle without her consent and obtained the test letters and free product samples.

Roberson was then taken inside the Post Office building, given her *Miranda* warnings, and was subjected to questioning by the Postal Inspectors. She was released. Approximately one month later, she was arrested pursuant to an indictment.

Roberson's Motion to Suppress the items seized from her purse and vehicle was overruled prior to the trial. A guilty verdict was returned by the jury.

SUMMARY OF THE ARGUMENT

It is Roberson's contention that the evidence seized by the Postal Inspectors was done so illegally and in violation of the Fourth Amendment to the Constitution of the United States. This Court and the trial court held that the seizure of evidence was incident to a lawful arrest and the plain view doctrine.

The plain view doctrine does not apply to the instant case for the reasons set out below. The Record clearly indicates that the test letters were prepared by the Postal Inspectors, were identifiable by the Postal Inspectors, had been placed in Roberson's regular mail for delivery, and that prior to approaching Roberson, the Postmaster had searched for the test letters in the Post Office building and determined that they were not there.

Upon seeing the letters in Roberson's possession, the Postal Inspectors took her purse from her and seized the letters without her consent. No application of the plain view doctrine can possibly exist. We cannot surmise that Roberson was under arrest simply because she was asked to step from her vehicle. Therefore, the evidence seized by the Postal Inspectors was not incident to a lawful arrest nor did the plain view doctrine apply.

ARGUMENT

If property is in "plain view", it may be seized without a warrant if [*Coolidge v. New Hampshire*, 408 U.S. 443, 468-472, 29 L.ED.2d 564, 91 S. Ct. 2022 (1971)]:

> (1) The police officer had a legitimate reason to be where he or she was:
>
> (2) The discovery of the evidence in plain view was inadvertent in that the police did not know it was there; (emphasis added)
>
> (3) It is immediately apparent to the police that the object in plain view is evidence.

The fatal defect in the Government's attempted use of the plain view doctrine is the lack of inadvertence in the discovery of the test letters. This evidence was prepared by the Postal Inspectors and was placed in Roberson's regular mail for delivery. The Postmaster unsuccessfully looked for the letters in the Post Office building before approaching Roberson. At the time the Postal Inspectors approached Roberson's vehicle, they knew full well what they were looking for.

In *Ball v. State* (1973) 57 WIS2d 653, 205 NW2d 353, the Court found that items seen through the window of a storage building by officers "...were not within plain view doctrine, where officers' observation through window could not be justified as inadvertent." This has been elaborated on in *U.S. v. Hall*, (1979) 468 F. Supp. 123, wherein the Court found:

> "Law enforcement officers may not invoke plain view doctrine if they purposely situate themselves to discover evidence they are seeking, i.e., if the discovery is not inadvertent."

The Postal Inspectors did not look into Roberson's vehicle inadvertently; their actions were fully planned and intentional. The Postal Inspectors had maintained loose surveillance of Roberson the entire day. Their approach to her vehicle and subsequent observation of the test letters can be defined as nothing less than intentional. This is in direct contravention of the prerequisite of the plain view

exception to warrant requirement. *U.S. v. Wright*, (1975) 405 F. Supp. 1236, Affirmed 532 F.2d 1374.

The warrantless seizure of the test letters by the Postal Inspectors, assuming the Postal Inspectors were in a place they had a lawful right to be, must also conform to an inadvertent discovery of the evidence in order to constitute their admissability. One without the other is not sufficient and is in violation of the Fourth Amendment. *United States v. Sifuentes* (1974, CA4 Va) 504 F2d 845.

Without the plain view doctrine to support the Government's seizure of the test letters, the subsequent arrest of Roberson was unlawful and the evidence obtained therefrom not admissable. In further support of this, Roberson urges that the naming and identifying of the test letters in a search warrant should have been accomplished. Roberson cites the following in support of this contention:

> Although arrest may be valid on theory that arrestee was committing felony in presence of law enforcement officer, seizure of contraband which was in "open view" at time of arrest was unlawful, since such contraband could easily have been specified in prior search warrant; in seizing goods and articles, law enforcement officers must secure and use search warrants wherever reasonably practicable. *Trupiano v. United States* (1948) 334 US 699, 92 L Ed 1663, 68 S Ct 1229 (ovrld on other grounds, *United States v. Rabinowitz*, 339 US 56, 94 L Ed 653, 70 S Ct 430, ovrld on other grounds *Chimel v. California*, 395 US 752 23 L Ed 2d 685, 89 S Ct 2034, reh den 396 US 869, 24 L Ed 2d 124, 90 S Ct 36).

The Postal Inspectors knew what they would be looking for before they began their search. Since search warrants are not directed at persons but, rather, they authorize the search of "places" and seizure of "things", [*Zurcher v. Stanford Daily*, (1978) 436 US 547, 56 L Ed 2d 525, 98 S Ct 1970 reh den 439 US 885, 58 L Ed 2d 200, 99 S Ct 231, 99 S

Ct 232] it was reasonably practicable to obtain a search warrant for the test letters prior to the unlawful arrest of Roberson.

CERTIFICATE OF SERVICE

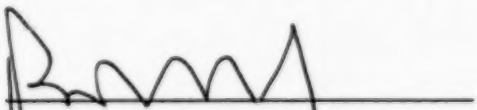
I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid to:

Archie Carl Pierce
Assistant United States Attorney
Federal Courthouse
200 West 8th Street
Austin, Texas 78701

and

Solicitor General
Department of Justice
Washington, D. C. 20530

on this 9th day of October, 1981.



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Denial of Petition for Rehearing, United States Court of Appeals for the Fifth Circuit..... 11

United States of America vs.

DEFENDANT: JUSTINE P. BOBRICK

FILED
SEP 1 1980
CHARLES W. VAGNER, Clerk
By [signature] Deputy

United States District Court for
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DOCKET NO. W-80-CR-7

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL Byron L. McClellan, Jr.
(Name of counsel)

Defendant waived personal appearance at arraignment and entered plea of not guilty.

MONTH DAY YEAR
July 2, 1980

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea.

[ ] NOLO CONTENDERE.

[X] NOT GUILTY

FINDING & JUDGMENT

There being a ~~jury~~ verdict of

[ ] NOT GUILTY. Defendant is discharged

[X] GUILTY, on July 31, 1980

Defendant has been convicted as charged of the offense(s) of embezzling three (3) first-class letters which had been entrusted to her as an employee of the United States Postal Service, and which had come into her possession intended to be conveyed by mail, the said letters being addressed to 7011 Cedar Grove, Copperas Cove, Texas 76522, in violation of Title 18, United States Code, Section 1709.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

[signature]
FRED SHANNON

Date September 5, 1980

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-2029

U.S. COURT OF APPEALS
FILED
AUG 24 1981
GILBERT F. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUSTINE H. ROBERSON,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(August 24, 1981)

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE [illegible] AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Form 703-2

UNITED STATES of America,
Plaintiff-Appellee,

v.

Justine H. ROBERSON,
Defendant-Appellant.

No. 80-2029
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 7, 1981.

Appeal from the United States District Court for the Western District of Texas.

Before John R. BROWN, POLITZ and TATE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Appellant, Justine H. Roberson, an employee of the United States Postal Service, was convicted of mail theft in violation of 18 U.S.C.A § 1709 and sentenced to one year. She appeals this conviction alleging an unlawful arrest and subsequent illegal search as well as an improper voir dire instruction on the elements of proof. Finding that all three grounds of error constitute "dead letters," we cannot deliver a reversal.

The Plant

In May 1980, Roberson was employed as a mail carrier for the Post Office located at Copperas

Cove, Texas, which became the target of a departmental investigation following a series of customer complaints about lost mail. To ferret out the possible source of the security problem, Postal Inspectors prepared three easily identifiable "test letters" resembling envelopes typically used for consumer cash refunds. After addressing the letters with fictitious names and bogus addresses, the Postal Inspectors planted the "test letters" into the Copperas Cove Post Office mail scheduled to be delivered the following day.

The next morning on May 14, 1980, Roberson reported for work and began sorting the day's mail, including the three "test letters" as well as product samples of extra-dry deodorant. During a "loose surveillance" of Roberson on her mail route, the Inspectors observed that she skipped deliveries of the free product samples among some of the addresses. When she completed her route at approximately 2 p.m., she returned to the Post Office parking lot where she was observed removing a box from the Government mail jeep to her personal vehicle. The Inspectors were able to observe through the windows of her vehicle that the box contained the undelivered deodorant samples. The Inspectors then looked for the three "test letters" in the Post Office "dead letter" box, where Roberson should have placed them upon her return. However, their search yielded nothing. At 4 p.m., Roberson left work and went to her car. As the Inspectors approached the car, they witnessed Roberson tearing into one of the test letters which she immediately attempted to cram back inside her purse when the Inspectors identified themselves. At trial, the Inspectors testified that when she stepped from the car they had a full view of all three "test letters" in her purse. The letters and box of deodorant samples were removed from the vehicle and Roberson was escorted into the Post Office. Once inside, Roberson was given her

Miranda warnings which she acknowledged in writing and verbally agreed to waive those rights. After questioning, she was released until about one month later when she was taken into custody pursuant to an indictment. Prior to trial, Roberson's motion to suppress the items seized from her purse and vehicle, and her statement admitting the theft at the time of the initial questioning, was overruled. A guilty verdict was returned by the jury.

The Arrest

Roberson contends that she was searched, detained and questioned by Postal Inspectors without being formally arrested. Alternatively, she argues that if the Inspectors' actions constitute an arrest, it was invalid because there was no probable cause or authority for the Inspectors to make a warrantless arrest. We address this latter argument first.

[1, 2] Title 18 U.S.C.A. § 3061(a)(3) authorizes Postal Service officials to make warrantless arrests "if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." This Court has found "reasonable grounds" to be equivalent of "probable cause." United States v. Gibson, 462 F.2d 400, 402 (5th Cir. 1972). Furthermore the Supreme Court has perceived the legitimate intent behind § 3061 to expressly empower Postal Inspectors the right to arrest without warrant upon probable cause. United States v. Watson, 423 U.S. 411, 416 n.4, 96 S.Ct. 820, 824 n.4, 46 L.Ed.2d 598, 604 n.4 (1976). The record before this Court amply demonstrates that the Inspectors had "probable cause" to take Roberson into custody. They had (i) received an unusual number of customer complaints about lost mail, (ii) observed Roberson taking a box of mail from the Government

vehicle and placing it in her own car which they later observed to be the undelivered product samples, (iii) failed to find the undelivered "test letters" in the "dead letter" box of the Post Office, and (iv) viewed the partially opened "test letters" in Roberson's possession.

[3] Roberson's arguments that exigent circumstances failed to justify a warrantless arrest and that the Inspectors had enough time to obtain a warrant also fails. Exigent circumstances are not constitutionally required to make a warrantless arrest in a public place when probable cause exist. United States v. Butler, 611 F.2d 1066, 1070 (5th Cir. 1980); United States v. Campbell, 575 F.2d 505, 507 (5th Cir. 1978). These facts and circumstances which were within the knowledge of the Postal Inspectors at the time of the arrest were sufficient to reasonably justify their belief that an offense had been committed. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

[4] We next consider whether or not Roberson's detention constituted an arrest. Once probable cause has arisen, this Court has considered three additional factors in deciding whether interrogation has occurred in a custodial context: "[W]hether the subjective intent of the officer conducting the interrogation was to hold defendant; whether the subjective belief of the defendant was that her freedom was significantly restricted; and whether the investigation had focused on the defendant at the time of the interrogation." United States v. Williams, 594 F.2d 86, 92 n.12 (5th Cir. 1979); United States v. Warren, 578 F.2d 1058, 1071 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980). See also United States v. Nash, 563 F.2d 1166, 1168 (5th Cir. 1977).

The record in the present case clearly establishes each of the three Williams factors. Roberson was escorted into the Post Office, given her Miranda warnings and questioned by the Postal Inspectors. These actions made it obvious that the Inspectors intended to detain Roberson and that the investigation had focused solely on her. She was not free to leave nor did she attempt to do so. Although the Inspectors at trial admitted that they did not tell her she was "under arrest," neither formal words nor the filing of a formal arrest record is required to place an individual under arrest. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); United States v. Ashcroft, 607 F.2d 1167, 1168 (5th Cir. 1979), cert. denied, 446 U.S. 966, 100 S.Ct. 2944, 64 L.Ed.2d 826 (1980). Unquestionably, sufficient "probable cause" existed for Roberson's detention by the Postal Inspectors and such detention constituted an arrest within the full statutory authority granted to Postal Service officials.

The Search

[5] Roberson continues her argument by contending that any evidence seized subsequent to an unlawful arrest could not be justified as "incident to a lawful arrest" and erroneously admitted by the Court. Finding, as we do, that the Inspectors made a valid arrest, the search of Roberson's person and and the area within her immediate control was justified under Chimel to protect the Inspectors' safety or to prevent Roberson from concealing or destroying the "test letters." Chimel v. California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694 (1969); United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973).

More importantly, we find that the evidence obtained pursuant to this lawful arrest is admissible under the plain view doctrine which requires that the officer view an object of evidentiary value from a position where he is lawfully entitled to be. Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067, 1069 (1968); United States v. Diecidue, 603 F.2d 535, 559 (5th Cir. 1979). Certainly, the Postal Inspectors were in a place where they were lawfully entitled to be--the Post Office parking lot. During the surveillance of this area the Inspectors watched Roberson remove a box from the Government vehicle to her personal car, and then, upon her departure, peered through the car windows to discover that the box contained undelivered deodorant samples. Distinguishing articles of evidentiary value through the doors or windows of an automobile is entirely within the scope of the plain view doctrine. United States v. McDaniel, 550 F.2d 214, 218 (5th Cir. 1977); Nunez v. United States, 370 F.2d 538 (5th Cir. 1967). Additionally, the Inspectors easily spotted the uniquely patterned "test letters" in Roberson's open purse when she stepped from her car. Because the seizure of the "test letters" and consumer samples was justified under the Chimel doctrine and the plain view doctrine, we find that the trial court did not err in denying Roberson's motion to suppress this evidence.

The Instruction

[6] Lastly, Roberson objects to the trial court's instruction to prospective jurors that the Government must prove the elements of the offense beyond a reasonable doubt, but need not prove the exact hour of the day that the crime

occurred,[1] Because there was no objection by Roberson's counsel at the time of the comment, we are required to view this complaint by a plain error standard. United States v. Berroa, 628 F.2d 368, 370 (5th Cir. 1980); United States v. Baptiste, 608 F.2d 666, 668 (5th Cir. 1977). See F.R.Crim.P. 52(b). "Plain error" is that which affects the substantial rights of the parties, United States v. McLeod, 608 F.2d 1076, 1078 (5th Cir. 1979), and by that analysis, will result in a reversal only if the error involves "serious deficiencies which affect the fairness, integrity or public reputation of the judicial proceedings or which constitute obvious error." United States v. McGuire, 608 F.2d 1028, 1034 (5th Cir. 1979), cert. denied, 444 U.S. 1092, 100 S.Ct. 1060, 62 L.Ed.2d 782 (1980).

[7] The indictment in the present case alleged only that the offense occurred "on or about May 14, 1980." Under 18 U.S.C.A. § 1709, the alleged offense must minimally contain the following three elements: (i) at the time and place alleged the Defendant was an employee of the Postal Service, (ii) a letter intended to be conveyed by mail then and there came into the Defendant's possession as an employee of the

1. I have told you, ladies and gentlemen, that the Government must prove each of the basic elements of the offense beyond a reasonable doubt. That doesn't mean they have to prove exactly what time of day this occurred. They have to prove on or about the day as alleged in the indictment. I am telling you they don't have to prove every single little insignificant fact. It does mean they have to prove beyond a reasonable doubt every basic fact.

R. vol. II, at 222.

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Postal Service, as charged, and (iii) the Defendant then and there embezzled the letter, as charged. The trial court's comment that the Government was not required to prove the exact time of day the offense occurred was not error. In fact, it was a correct statement of the law. Clearly, these instructions (see note 1, supra) did not violate any of Roberson's substantial rights or deny her a fair trial.

Our review of the record as a whole has not revealed any of the lower court's fact findings to be clearly erroneous or judicial orders or conclusions to be wrong. The conviction was legally supportable.

AFFIRMED.

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